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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner,*

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., and the NEW YORK CENTRAL RAILROAD COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner BLF&E prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered herein on February 28, 1969.

Opinions Below

The oral opinion of the United States District Court for the District of Columbia on September 7, 1966, reported at

258 F. Supp. 346, and the opinion of the Court of Appeals for the District of Columbia Circuit on February 28, 1969 (not yet reported) are set forth in Appendix A, *infra*, p. 29. The judgment of the Court of Appeals entered on February 28, 1969 is set forth *infra* at p. 41.

Jurisdiction

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit were entered on February 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Statute Involved

Public Law 88-108 (77 Stat. 132, 45 U.S.C. following § 157) is set forth in Appendix B, pp. 43 to 46, *infra*. Relevant portions of the Award of Arbitration Board 282 issued under Public Law 88-108 appear at 41 LA 673, and at pp. 11-18 of the Joint Appendix in the Court below.

Question Presented

In an earlier ruling the Court below held that because Congress could be deemed to have intended that result the job abolitions effected during the life of the Arbitration Award under Public Law 88-108 continued in effect although the Public Law and the Award expressly limited the duration of the Award to a two-year period. In the present case the Court below holds that, notwithstanding the manifest Congressional purpose to protect long-time firemen against wage diminutions and job deterioration, the Award's job elimination procedure may be employed after its expiration to effect wage diminution and job deterioration among the remaining firemen simply because no specific provision of the Award precludes such carrier action. The question thus presented is whether the job-abolition provisions of

the Award may be used by carriers after the Award's expiration so as to force wage reductions and job deterioration upon senior firemen for whom Congress intended lifetime work and wage protection.

Statement

This case presents a vital issue arising from the 1963 Public Law imposing interim compulsory labor arbitration in the railroad industry. Public Law 88-108 of that year authorized a two-year arbitration of disputed bargaining issues, including the question of fireman-manning. The first judicial test concerned the validity of the Award of Arbitration Board 282; the Award was upheld and this Court denied review. *Brotherhood of Locomotive Firemen and Enginemen* v. *Certain Carriers, etc.*, 331 F. 2d 1020 (C.A. D.C. 1964), cert. denied, 377 U.S. 918 (1964). Another question litigated during the life of the Award arose from the carriers' contention that the Award superseded state full crew law requirements; that contention was reviewed and rejected by this Court. *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423 (1966). Upon expiration of the Award in 1966, despite the two-year limitation in both statute and Award it was held by the Court below that carriers may not only continue to operate without firemen those crews from which the fireman had been removed during the Award but can also operate without firemen those crews merely designated for fireman-removal when a post-Award vacancy arises because the incumbent fireman dies, retires, or becomes promoted. *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, 385 F. 2d 581 (C.A.D.C. 1967), cert. denied, 390 U.S. 923 (1968).

The Award thus having by judicial construction been given continuing vitality after its expiration, there arose for necessary resolution the present issue concerning the

post-Award working rights of firemen retained in service. Pursuant to Sections C(6) and C(7) of the Award [1] such "protected" firemen are given lifetime guarantees of employment, but after the Award expired the carriers proceeded to subject them to an unprecedented process of job deterioration. Resorting to the job "blanking" procedures originally authorized by Award 282 as the means to effect reduction in the numbers of working firemen during the Award, carriers have been employing that technique simply to force remaining firemen from the desirable jobs they held when the Award expired to less desirable lower paying assignments. In approving that carrier practice, the Court below validates a perverted post-Award use for *job deteriorations* of procedures authorized during the Award for the quite different purpose of *fireman reductions*. The resulting erosion of senior firemen's job rights flies directly in the face of the work and wage security which Congress and Board 282 clearly sought to assure for the protected C(6) and C(7) firemen retained in service.

We set forth hereafter the relevant facts, which expose an inverted interpretation by the Court below of the first Congressional experiment in compulsory labor arbitration. We demonstrate that what is at stake is the integrity of the 1963 Public Law, which had a major protective purpose to assure that notwithstanding its job reduction procedures every employee "with a significant attach-

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[1] Section C(6) of the Award provides in terms that firemen with less than 10 years seniority retain their full rights "unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified . . ."

Section C(7) of the Award provides in terms that firemen with 10 or more years of seniority "shall retain their rights to and obligations to protect engine service assignments . . . unless and until retired, discharged for cause, or otherwise removed . . . by natural attrition."

The relevant portions of the Award of Arbitration Board 282 appear at pages 11 to 18 of the Joint Appendix.

ment to the railroad industry" would "retain the right to his present employment or to comparable railroad employment at comparable pay. . . ."[2]

1. *Background: The 1967 Ruling Continuing the Award Past Its Expiration Date.* The present question concerns the carriers' power to "blank" runs after expiration of Award 282 to force men into lower wage assignments. That question was held in abeyance in the Court below until it was decided whether the job reduction procedures and provisions of Award 282 survived the Award's expiration. The Award-continuation issue was resolved by the 1967 ruling of the Court of Appeals for the District of Columbia in *Brotherhood of Railroad Trainmen* v. *Akron and Barberton Belt R. Co.*, 385 F. 2d 581, cert. denied, 390 U.S. 923 (1968). In that decision, the Court below recognized that Congress had expressly prescribed a two-year period of effectiveness for the Award. Nevertheless, it held in essence that the reduction in the number of fireman jobs imposed during the period of the Award would continue. And it based this conclusion, which it recognized was contrary to the literal terms of the statute, upon the Congressional intention.

Thus, the Court of Appeals ruled that crews from which firemen had been removed as of the expiration of the Award could be operated without firemen thereafter (385 F. 2d at 592-594), and that even where a fireman was still on a crew as of the Award's expiration, if the crew had previously been "listed" by the carrier for abolition it might be operated without a fireman after the Award once the incumbent fireman "dies or retires" (385 F. 2d at 610-611). In substance the Court ruled that the Award continues in effect substantially as it did during its own life, excepting only "new runs" created after Award expiration and the limita-

[2] Presidential Special Message to Congress requesting emergency legislation, July 22, 1963: H. Doc. No. 142, 88th Cong., 1st Sess.

tion that now protected firemen may no longer be removed from service under the Award's severance provisions. To the BLF&E's objection that such a result effectively expunges the clauses of the Public Law and the Award limiting its life to a two-year period the Court of Appeals responded that a contrary ruling "would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order [permanent] deflation of the scope of the existing overmanning." 385 F. 2d at 594. The Court thus gave preference to presumed Congressional purpose over specific clauses of the Public Law and the Award stipulating a two year duration.

The Court's ruling on the Award-continuance issue in turn necessitated its resolution of the present question—whether after the Award's expiration a carrier can continue its "blanking" procedures so as to diminish the earnings of the remaining senior fireman or otherwise worsen his job. That question, on which the District Court had ruled adversely to the firemen in the fall of 1966, had been held in abeyance in the Court of Appeals by the consent of the parties until resolution of the underlying question of Award continuance, and was argued in the Court below only after its 1967 ruling had become final. We set forth below the genesis of the present litigation concerning the rights of the protected firemen upon expiration of Award 282.

2. *Proceedings in the District Court.* The issue of the carriers' post-Award obligations to protected firemen was originally raised in two separate federal proceedings: in a BLF&E suit in Indiana against the New York Central Railroad and an ancillary BLF&E application in the basic fireman-manning cases in the District of Columbia (J.A. 2, 3). The Indiana suit arose from the New York Central's issuing a bulletin, effective May 31, 1966, which eliminated certain fireman jobs and forced the men to take others; this had

the practical effect of requiring firemen to move their homes from Mattoon, Illinois to serve in Indianapolis, Indiana, where the carrier was required to have firemen on various jobs. On June 2, 1966, the BLF&E brought suit in the United States District Court for the Southern District of Indiana (J.A. 232) against the carrier's placing that bulletin into effect, which suit was transferred to the District of Columbia. In the meantime, in the basic fireman-manning cases in the District of Columbia the BLF&E filed motions for injunctive relief in August of 1966 to restrain all the carriers from taking affirmative steps after the Award to alter the status of firemen in effect at the expiration of the Award, or to make any changes that would worsen their working conditions (J.A. 139, 140).

The BLF&E motions in both proceedings came before the District Court on September 7, 1966 upon affidavits and counter-affidavits. The showing by the BLF&E was that the carriers were continuing to engage in affirmative action after expiration of the Award by removing firemen from "blankable" runs,[3] in order to avoid hiring new men for vacant slots that the carriers were required to fill and to force remaining firemen into lower-paying jobs. In that connection the record demonstrated hardship and deprivation, unprecedented prior to or during the Award, now thrust upon senior firemen when they are forced into less desirable jobs to effect carrier cost reductions. General Chairmen of the BLF&E filed affidavits detailing numerous incidents after the Award in which carriers have removed the fireman from a listed

[3] The Award provided that the carriers would list the crews which did not require the services of a fireman and the BLF&E would thereafter veto 10 percent of those so listed (J.A. 11-13). A "blankable" run was one listed and not vetoed, but on which a fireman was still retained at the end of the Award because of the necessity of giving work to C(6) and C(7) men. When the fireman on a "blankable" run died, retired or was promoted, the earlier decision of the Court below permitted that run to be operated without a fireman thereafter—i.e., "blanked."

assignment by abolishing it with the effect of forcing a fireman into a less desirable lower paying assignment. See generally, J.A. 84, 189; 65, 194; 59; 34, 160.

The affidavits show continuous denial of firemen job rights previously honored before and during the Award. Among the contractual rights previously accorded firemen was the right of relative *job security*. Once the senior man bid successfully on an assigned run or pool crew, as long as it operated he held it unless he was bumped by a man senior to him. Now the carriers remove a senior fireman from a listed run at their own will and discretion. To effect wage savings they are engaging in a constant game of "blanking" and "unblanking" positions (see, e.g., J.A. 33, 36, 39-40, 59-60, 66, 73, 86, 88, 89), so that the concept of job security has virtually disappeared and the holding of an assigned run means no more than incumbency at the pleasure of the carrier (J.A. 192).

Another significant right formerly enjoyed by contract and practice was a fireman's *right to choose* the assignment which his seniority could win him by competitive bidding. This right, too, has virtually disappeared because on a daily basis listed jobs are abolished and blanked jobs are unblanked. The carrier continually shuffles around the existing assignments in a way which leaves the fireman no actual options at all with respect to his assignment. If he does not bid in on the single job the carrier has left "unblanked", he has no work at all (J.A. 34, 189).

A corollary of the fireman's right to choose his assignment has always been the opportunity of senior men to *have the better jobs* among the operating runs and crews. This right too has now evaporated, since it is precisely the purpose and effect of the carriers' "blank-unblank" operation to hold the remaining firemen to the lowest paying among the operating engine crews. By this process many of the senior firemen who remained on desirable assignments at

the end of the Award have since its expiration been moved by carriers into far less desirable jobs (see e.g. J.A. 40-41, 65, 67).

In sum, by post-Award affirmative acts carriers are denying senior firemen their time-honored job security, job choice, and job advantage, and are inflicting unprecedented hardships upon them. The hardships involve tangible loss of monthly pay (J.A. 33, 36, 42-44, 61, 66, 68-71, 76-77, 86-89, 158-159), assignments keeping men far from their homes and chosen areas of work (J.A. 45, 72-73) or entailing arduous and inconvenient hours of labor (J.A. 54-55); jobs located so far from the fireman's home district as to require the moving of his family (J.A. 67, 196); work requiring physical stress suitable for junior men but quite unsuitable for senior firemen (J.A. 304-306); assignments affording inconvenient facilities requiring extra personal expenditures for food or lodging (J.A. 40, 45, 66), and similar unprecedented burdens.[4]

The stresses to which firemen are now subjected are summarized in the affidavit of J. L. Shattuck, Vice President of the Brotherhood of Locomotive Firemen and Enginemen. It sets forth the ways in which firemen are suffering financial and personal hardship through affirmative acts of the carriers for the purpose of saving wages by forcing

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[4] Illustrative is the case of fireman Ralph VanDover, who relates his situation as follows (J.A. 51):

"This is a letter stating of the abolishing of these jobs at Poplar Bluff, Missouri, which I held the 359 Switch Engine. I have held this job since 1948 being a restricted fireman. Per Article 58. Now, I am being forced from this job at Poplar Bluff to take the same kind of job at Saint Louis Missouri. We have three Switch Engines at Saint Louis, which are veto jobs, and has to be filled by a fireman. Now, these fireman already on these jobs has to take another Switch Engine or Ex-Board at Saint Louis. These Switch Engines at Poplar Bluff Missouri are blankable jobs. My Local Chairman of Lodge #6 tells me I can take any Switch Engine at Saint Louis whether it is a blankable job or veto job. But why do I have to leave my job at Poplar Bluff and take the same kind of job at Saint Louis Missouri? I have had 29 years service as fireman . . ."

firemen into less desirable and less remunerative jobs (J.A. 94):

> "i. They [the carriers] have blanked desirable runs near the homes of firemen and have forced firemen to take less desirable runs at long distances from their homes.
>
> ii. They have blanked desirable runs and forced firemen to take lower-paying and otherwise less desirable runs.
>
> iii. They have blanked desirable runs and forced firemen on to the Extra Board.
>
> iv. They have blanked desirable runs and forced firemen to less desirable runs in full crew states far from their homes.
>
> v. They have blanked desirable runs when firemen went on vacation and forced the men to take poorer jobs when they returned from vacation; they thus also have denied seniority to junior firemen on these jobs during vacation periods. . . .
>
> ix. They have blanked and unblanked jobs to deny firemen the overtime to which they were entitled under the rules and working conditions in effect at the expiration of the Award.
>
> x. They have failed to issue bulletins with respect to blankable assignments and simply called men to fill jobs as they see fit on a day to day basis. . . .
>
> xii. They have blanked runs and forced bumping situations in which the railroads save money by virtue of the fact that each bump results in lost runs.
>
> xiii. When jobs have been unblanked in order to provide work for junior firemen, they have unblanked jobs at great distances from the homes of such junior firemen, when other jobs nearer home could have been unblanked. . ."

3. *The District Court's Ruling.* At the District Court hearing of the case thus presented, Judge Holtzoff showed considerable sympathy for the position of the BLF&E, at least where the carrier is removing a man from a listed job simply for wage-reduction reasons. As he stated it, "I would have thought that except for transfers to must fill jobs that firemen could not be transferred to another job that does not have to be filled merely for the purpose of reducing expenses to the carrier. . . ."

> "The Court: . . . the situation that bothers me is where you have two useless[5] jobs, so to speak, and may you move a fireman who is in the better useless job to a worse useless job in order for the carrier to save money?
>
> Mr. Shea: . . . Well, there are a variety of operating reasons for this kind of thing, and the only way we could tell would be to take them one by one. In one instance, for example, practically all the men in a pool, in a firemen's pool, had for one reason or another gone somewhere else. There were a few left. Well, to continue the operation of the pool in those circumstances would be an inefficient, poor kind of operation from the point of view of the management of the railroad, they ought to be put somewhere else.
>
> Now there isn't any instance which has been cited here of the railroads trying to use this for some kind of — to do the men in or something of this sort. . . .

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[5] Judge Holtzoff's use of the word "useless" is as inapposite as it is offensive to the workers. The neutral members of Arbitration Board 282 examined the opposing contentions and concluded that "[t]he record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work." 41 LA at 687. They made an express finding of "usefulness": "We think it clear", said the opinion, "that firemen are presently performing useful services." 41 LA at 688.

The Court: . . . My difficulty is with the situation where they say to a man You are useless anyway, we have a number of useless jobs, we will transfer you to another useless job where we will have to pay you less. Can they do that?

Mr. Shea: Well, I would think they could, Your Honor.

The Court: You know, at first blush, if it was not for these rulings of Board 282, I would have thought that except for transfers to must fill jobs that firemen could not be transferred to another job that does not have to be filled merely for the purpose of reducing expenses to the carrier.

But I am rather impressed by the answers of Board 282 [on Question 43] which seem tentatively to lead to the conclusion my first impression was wrong." (Tr. Sept. 7, 1966, pp. 46-51).

The ruling of Board 282 on Question 43 (see *infra*, p. 33) was thus suggested by Judge Holtzoff as the sole rationale for rejecting the BLF&E's showing of hardship and loss of working rights through affirmative carrier action taken after expiration of the Award. That ruling had in general terms authorized carriers to choose the crews from which firemen were to be removed coincident with the fireman-severance provisions of Award 282. The same rationale was espoused in Judge Holtzoff's oral opinion issued on September 7, 1966 (*infra*, Appendix A, p. 32).

"The next problem is more complicated. To what extent may a carrier transfer a protected fireman from the position to which he has been assigned to another position which need not be kept filled?

Specifically, as a suppositious case, suppose there are 50 firemen positions in a particular seniority dis-

trict of which 15 are the type that must be filled. Suppose some of the remaining 35 gradually become abolished by the process of attrition due to death, resignation or retirement. May the carrier transfer a protected fireman to another position within that group?

A cognate question is, may a carrier abolish some of the positions within that group and then transfer their incumbents to other positions within that group? This question is necessarily covered by paragraph D(2) of the Award, to which reference has already been made.

The question is not a simple one. Paragraph D(2) provides that firemen who remain on the active working lists shall have the right to work their turn as firemen to the extent that positions as firemen are available in their respective seniority districts.

The question arises whether the carrier, under this provision, may make certain positions unavailable by abolishing them. Some light is cast upon this question by the further provision in the same paragraph that firemen shall have no right to jobs that the carrier may discontinue, pursuant to the provisions of this Award, if other employment in any class of engine service for which they are qualified is available. That qualification seems to refer, however, to positions that the carrier discontinues or abolishes as a result of a vacancy arising due to death, resignation or retirement.

The question would not be free from doubt and there would be ambiguity in these provisions of the Award were it not for the fact that the Board has construed this Award and has passed upon the questions that are presented to this Court for decision.

Naturally, the Arbitration Board, under the Railway Labor Act, had the power to construe its own Award.

Question 43, submitted to the Board by the Brotherhood of Locomotive Firemen and Enginemen, and the answers thereto, read as follows. . . .

"Now it is clear under the interpretation of the Board that the carriers have to maintain enough positions to accord an opportunity for employment to all the protected firemen within their seniority districts. In other words, they are under no obligation to maintain any specific position, and that being so, they have a right to transfer a protected fireman from one position to another within the seniority district to achieve a right to abolish certain positions, as they choose, provided they retain enough to furnish employment to all the protected firemen on their active lists.

The Court realizes that some hardship and some detriment will result to some of the protected firemen under certain circumstances. There is some degree of protection, of course, in the fact and in the requirement that in making transfers the order of seniority must be followed by the carrier."

The view espoused by Judge Holtzoff in his oral opinion was incorporated in his final order (J.A. 229, 277-278), which provides that firemen "may be transferred" to jobs other than those they held at the Award's expiration on March 31, 1966, and that the carrier "may abolish or discontinue any fireman position" which was not required to be maintained under the Award. By these blanket authorizations the District Court has permitted carriers to remove firemen from listed runs simply to effect wage savings by forcing firemen into less remunerative assignments. To the right of job reduction approved by the Award during its two-year life, the District Court thus added a carrier right to vest continuing job deterioration upon remaining firemen after the Award expired.

4. *Petitioner's Contention in the Court Below.* Petitioner's principal contention below was that the post-Award removal of protected firemen from jobs they held at the Award's expiration subjects them to job deterioration infringing upon the work security and job rights which they have always enjoyed, and "which it was the signal purpose of the statute and the Award to secure to them." Numerous citations from the legislative history were cited in support of that proposition. Thus the Report of the Presidential Railroad Commission of February 1962 had stated (pp. 7-8):

> "A period of transition is necessary because it isn't prudent to make a sharp and precipitate break with the past. Were it possible to start afresh, to write on a clear slate, we believe that rational men would not today begin with the existing code of rules as the basic point of reference for the future. We are not free to start afresh, however. Lives and livelihoods have been committed to and are held hostage by the existing order. Revolutionary changes even for the better carry a high price in disruption. That price might exceed the value of the improvement. Moreover, personal and social values are involved which in this country we prize highly. They cannot be measured merely on a dollar scale."

This philosophy expressed by the President's Commission on the work rules dispute was shared by every public official and every official body involved in the settlement of that dispute. It was the moving force behind the actions of Congress and of Board 282 manifested in the uniform concern to safeguard the lifetime working rights of "protected" men retained in service when the Award expired from any adverse effect of the Award. President Kennedy espoused the principle of lifetime protection in his message to Congress requesting the national emergency legislation that

became Public Law 88-108 (109 Cong. Rec. 13004, H. Doc. No. 142, 88th Cong., 1st Sess., 1963), recommending that any arbitrators be charged "to require fair and equitable arrangements to protect the interests of the affected employees". He traced this principle back to the "protection provisions . . . recommended by the Presidential Commission and Emergency Board reports", and explained:

> "Emerging from the recommendations of these boards was the principle that, while many jobs would not be filled following the death, retirement or voluntary transfer of the present occupants, *every present employee with a significant attachment to the railroad industry would retain the right to his present employment or to comparable railroad employment at comparable pay* . . . In short, no one would be thrown out in the street; and while the railroads gradually modernized their operations, there would be little, if any, loss to individual employees." (Emphasis supplied.)

In the collective bargaining negotiations which preceded the enactment of Public Law 88-108, the parties, with the efforts of Secretary of Labor Wirtz, had provided, *inter alia*, that

> "All firemen (helpers) with ten years or more seniority as of August 15, 1963, except those covered by subparagraph 3 and 4 below, *shall retain their job rights as they would have existed on that date if this agreement had not been entered into.*" (Emphasis supplied.)

Exhibit S to the Secretary's report reflected the agreement of the parties that this job rights provision was "acceptable in principle." Public Law 88-108 (Appendix B, *infra*) expressly enjoined the Arbitration Board to "incorporate in [its] decision any matters on which it finds the parties were in agreement" (Sec. 3; see also 6th Whereas Clause).

The overriding concern for the lifetime protection of employees "with a significant attachment to the railroad industry" expressed by the boards and by the President was, in conformity with the Congressional intention, reflected by Arbitration Board 282 in its Award. In its "comparable job" guarantee for C(6) employees, and its lifetime job guarantee for C(7) men, the Award institutionalized the protection principle. The very structure of the Award reflects the fundamental concern of Arbitration Board 282 with protection for individual firemen. The Board carefully distinguished between *positions* involved, the firemen's jobs, and the *people* involved, the individual firemen. In Part II of the Award, dealing with firemen, Paragraph B deals with reductions in jobs, and a separate Paragraph, Paragraph C, deals with reductions in employment of people. While the former established the procedures under which the number of firemen jobs might be reduced, the latter established a separate and distinct set of rights and protections attaching to individual firemen. Manifestly, the abolition of a job did not necessarily empower the carrier to terminate the fireman incumbent on that job. To the contrary, a fireman was entitled to the benefits and protections of Paragraph C before he could be adversely affected by carrier action even during the Award.

Highlighting this concern for the protected employee, the Opinion of the Neutral Members of Board 282 (41 LA 673, 697) stated that "*in no way will his employment rights be affected adversely by the award*":

> "In our handling of . . . the fireman issue, we have adopted the view that the effect of our award should not result in serious hardship to those men who have been attached to the industry for any considerable length of time. Because the number of brakemen and helpers jobs that are likely to be eliminated is such a small percentage of total employment in these crafts,

> the attrition principle is the fairest method of controlling job elimination.
>
> Our award provides that all employees, other than those on furlough on the date the award becomes effective, are to be regarded as 'protected employees'. A 'protected' employee is to continue as an active employee until he quits, retires, dies, or is discharged for cause. In no way will his employment rights be affected adversely by the award."

Nor were these employment guarantees imposed upon the carriers over their objections. ". . . [E]ven in those areas where disagreement was sharpest", the Board pointed out, "we have found a common recognition that, where a job has been determined to be unnecessary, the equities of the fireman working on that job may nevertheless properly affect the method and timing of its elimination." In conformity with this agreement, the Board pointed out that with respect to C(6) men, "our award in this respect simply reflects the substantial area of agreement between the parties . . ." And the Board continued, "There has never been any dispute in these proceedings over the status of firemen with ten or more years of seniority [C(7) men]. Our award reflects the agreement between the parties that all firemen in that category who are not 'irregulars' or on furlough shall retain all existing employment rights, except as modified by the provisions of the award relating to reduction of jobs, and that, in any event, they shall not be terminated except for cause or by natural attrition." 41 LA 686, 693.

5. *The Ruling Below.* Despite this history the curt *per curiam* decision below upholds in general terms the authority of a carrier "to take action subsequent to expiration of the Award to remove the firemen from the listed runs." In reaching that result the Court of Appeals cites certain

interpretative rulings of Board 282 without answering petitioner's objection that the Board's rulings were explicitly restricted to the life of the Award, as both the Board [6] and the Court below [7] had earlier recognized. The Court also leaves unanswered the basic objection that there is a vast difference between utilization of the job abolition procedures during the Award as a means of reducing the ranks of the working firemen, and their utilization after Award expiration, when removal of men from service is no longer permitted, simply as a means of forcing senior firemen into lower paying assignments. Since removals from service of protected firemen are precluded after the Award expired, the abolition of blankable or listed assignments now no longer serves the underlying purpose of firemen reductions to which the Award was addressed. Rather, such carrier action now serves only to reduce the wages of the remaining

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[6] In one of its early rulings, responding to SUNA Question No. III, the Board had specifically *disclaimed jurisdiction* to interpret "the legal situation which exists following the termination of the Board's Award":

> "QUESTION: III. In the event the Carriers serve notice under caption III Consist of Road and Yard Crews (other than engine service) PART A—BASIC PROVISIONS A-3, or if procedures under PART B are not completed or decisions of special boards of adjustment have not been rendered under B-3 on the date Arbitration Board No. 282 terminates:
>
> Do all procedures terminate on the date the Board terminates?
>
> Are all decisions which may be rendered by a neutral subsequent to the date the Board terminates void?
>
> ANSWER: (6-9-64) These questions do not call for an interpretation of the Board's Award. They call for an opinion as to the legal situation which exists following the termination of the Board's Award. The Board, therefore, lacks jurisdiction to answer them."

[7] ". . . [T]he Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period." 385 F. 2d at 612.

protected firemen by forcing them into less remunerative assignments. The carriers would thus transform the provisions of the Award authorizing elimination of assignments during the Award to achieve firemen reductions, into an authorization for elimination of assignments after the Award expired to achieve wage reductions among protected firemen. The abolition of an assignment held by a fireman during the Award was appropriate and necessary to reduce the number of firemen. After the Award, when firemen reductions are no longer permissible, the sole purpose and effect—never approved by Award 282—is to diminish the wages of incumbent firemen by forcing them into the least desirable lower paying assignments.

Nor does the Court directly answer petitioner's second major argument—that the carriers' challenged post-Award practice denies to protected firemen retained in service the work security that Congress and Board 282 sought to assure them. To that objection the Court responds (*infra*, p. 40):

> ". . . it would be inconsistent with the structure of the award to say that they have a right to stay on the blankable job and the carrier has to hire a new man to put in a vacancy in a must-fill position. Even where the vacancy being filled is in another blankable position, there are Board precedents for the carrier.
>
> The only clear protection given by the Award to a C(6) and C(7) fireman is the right to be employed—even if the railway has to keep a fireman in a blankable position."

Apparently the lower Court recognizes the protective purpose reflected in the legislative history of the Public Law and the Award (see *supra*, pp. 15-18), but refuses to give effect thereto on the ground that there is no "clear protection given by the Award" to carry out that legislative purpose. We demonstrate in our argument for grant of

the writ that under accepted principles of statutory interpretation the refusal to give effect to clear legislative purpose in the judicial definition of firemen's post-Award working rights is inappropriate and erroneous. We urge grant of review because through a process of unduly narrow legislative construction the Court below has expunged a key protective purpose of Congress and inverted the basic intention of Congress in its initial experiment with compulsory arbitration.

The Ruling Below So Far Departs From Standards of Statutory Construction Established By This Court and So Completely Inverts the Purpose of Congress in Its First Approval of Compulsory Labor Arbitration as to Warrant Grant of the Writ of Certiorari.

In sharp contrast with the ruling of the Court below in 1967—extending job reductions beyond the explicit expiration date of both statute and Award in order to give effect to a presumed intention of the Congress—in the present case the same Court employs a contrary and wholly literalistic approach to statutory construction to deprive the remaining firemen of their post-Award job protections clearly intended by Congress. The weightiest doubts thus arise concerning both the reasoning and the result of the ruling below: 1) The literalistic construction of the present ruling stands in sharpest contrast with the same Court's 1967 decision, and is clearly contrary to the established standards of statutory interpretation approved by this Court; 2) the Court's two rulings taken together result in a complete inversion of the aim of the Congress in its 1963 compulsory labor arbitration experiment. Congress sought to approve only *temporary* job reductions yet to secure *lifetime* protection for firemen against wage reduction and job deterioration. By its 1967 and 1969 interpretations the Court below has made permanent the Award's job reductions while

rendering ephemeral and transitory the intended protection of senior firemen's work and wage rights.

1. *The rationale of the ruling below.* In responding to petitioner's contention that the statute and the Award under it "intends protection of C(6) and C(7) firemen", the Court below does not dispute the specific showing that Congress and the Neutral Members of the Board sought to safeguard senior firemen from work or pay detriment by virtue of the Award. Rather, the Court answers that the "only clear protection given by the Award to C(6) and C(7) firemen is the right to be employed." What the Court has done is to give controlling effect to the absence of a specific clause in Award 282 expressly granting "clear protection" from post-Award carrier blanking of jobs to effect the very wage reductions and job deterioration which it was the legislative intent of the Congress and the Arbitration Board to preclude.

In requiring a specific clause writing into the Award "clear protection" against post-Award job deterioration, the Court below simply overlooks the fact that the Award in no way sought to define the rights of the parties after its termination date, and that indeed it is only the 1967 ruling of the Court below which validates carrier resort to the job abolition procedure of the Award even after its expiration. Thus, Board 282 expressly limited the life of the Award to a two-year period and specifically declined to issue interpretative rulings concerning the rights of the parties after Award expiration, deeming itself without jurisdiction to do so (see *supra,* p. 19). Had the Board taken a different view and involved itself in post-expiration issues, in conformity with the Neutral Members' stated view (see *supra,* p. 17) it clearly would have ruled on the present question that "protected" men are immune from post-Award job deterioration by carrier resort to Award-approved "blanking" procedures. The opinion below in insist-

ing that petitioner has failed to produce a specific ruling of Board 282 on the present question is demanding something the Board itself could not have given under its view that its jurisdiction did not reach that far. The fact is that it was the Board's fair expectation as well as that of the Congress that upon its expiration the Award of Board 282 would be a nullity, and it was only the ruling of the Court below in 1967 which, by analogy to principles of labor contract, gave continuing life to the Award. Thus the insistence of the Court below on an express protection in the Award for senior firemen's post-Award working rights is the worst kind of boot-strapping, since it was the previous ruling of the Court itself which gave further life to the Award and thus created the present issue.[8]

Moreover, in interpreting statutes, and particularly federal labor laws, this Court has long rejected a literalism demanding specific language as the basis and has freely given effect to Congressional purpose reflected in the legislative history or fairly implied from the legislative context. In numerous labor law cases this Court has enforced rights it found fairly implied from the whole statute and the manifest Congressional purpose rather than any explicit statutory text. Among cases decided in recent years are: *Auto Workers* v. *Scofield*, 382 U.S. 205 (1965) (right of private

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[8] The opinion below studiously avoids petitioner's repeated insistence that since the issue at bar concerns the working rights of firemen after the Award's expiration it cannot be resolved by reference to the narrow terms of the Award itself. Thus quite inapposite is the observation in the opinion below (*infra*, p. 39, n. 1) that Sections C(6) and C(7) of the Award "protect the right to employment . . . but do not protect specific jobs." The very footnote wherein the Court makes that observation commences with the Court's own recognition that "Sections C(6) and C(7) are concerned with the impact of job reduction on firemen"; yet the Court declines to answer the salient objection by petitioner that upon the Award's expiration the job reduction procedure as a means for eliminating firemen from employment was terminated so that the blanking of jobs after expiration has the utterly different purpose of job deterioration which the Award never sought to authorize.

intervention in review of NLRB decisions); *Leedom* v. *Kyne*, 358 U.S. 184 (1958) (right to judicial relief against NLRB statutory violation); *McCulloch* v. *Sociedad National*, 372 U.S. 10 (1963) (right to immediate judicial relief against NLRB acts in excess of its powers); *California* v. *Taylor*, 353 U.S. 553 (1957) (right to Railway Labor Act protection against state-owned railroads); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957) (right to application of federal substantive law in suits under Section 301 of the National Labor Relations Act); *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) (right to application of substantive federal law in state breach of contract suits); *Machinists* v. *Street*, 367 U.S. 740 (1961) (right of union members under Railway Labor Act to dues rebate of political expenditures); *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238 (1966) (right of carrier under Railway Labor Act to reciprocal self-help); *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 89 S. Ct. 1109 (1969) (right to primary and secondary strike activity under Railway Labor Act). The ruling below is thus seen as an exercise in literalism quite out of keeping with this Court's numerous decisions construing federal labor laws so as to further the manifest Congressional purpose.[9]

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[9] Indeed, where Congressional purpose is clearly discerned from the legislative history or context, this Court has given it operative effect even in the face of plain and apparently contrary statutory language. Illustrative in the area of federal labor laws are *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612 (1967) (right to pressure employer to preserve traditionally performed work); *Houston Contractors Assn.* v. *NLRB*, 386 U.S. 664 (1967) (right to pressure employer to preserve traditionally performed work for sister local); *NLRB* v. *Marine Workers*, 391 U.S. 418 (1968) (immunity from union expulsion based on member's filing of Labor Board charges); *Electrical Workers* v. *Labor Board*, 366 U.S. 667 (1961) (right to picket separate gate for employees of neutral employer performing work connected with struck employer's normal operation); *Labor Board* v. *Lion Oil Company*, 352 U.S. 282 (1957) (right to strike after 60 days notice of modification of contract); *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270 (1956) (right to unfair labor practice strike within 60 day statutory

Indeed, in making controlling the absence of a specific provision, the ruling below stands in sharp and ironic contrast with the 1967 ruling of the same Court that the Award-approved job reductions continue in effect after Award expiration. There, despite explicit statutory and Award expiration dates, it was held that the job reductions made during the life of Award 282 should continue upon its expiration because *"it must have been reasonably contemplated"* by Congress that Award-authorized job eliminations would constitute a permanent "deflation" in the firemen's ranks. 385 F.2d 581, 594. In the present case, the Court does not question the much *clearer* showing that it was contemplated that senior firemen would not be subjected to job deterioration; yet now the Court makes controlling the absence of a specific protective clause in the statute or the Award. There is simply no way to reconcile the "must have been reasonably contemplated" 1967 decision extending the Award past its expiration with the present ruling making "clear protection given by the Award" a *sine qua non* for judicial vindication of an underlying enactive purpose. If implied legislative purpose was sufficient to overcome the express termination clauses of the Act and the Award, surely the expressed purpose of protecting senior firemen from wage diminution and job deterioration requires judicial vindication in like manner.

2. *The result of the ruling below.* As objectionable as is the Court's reasoning, even more so is the inverted result which that reasoning has produced. In allowing carriers seeking wage savings to thrust post-Award job deterioration upon the remaining firemen the Court below validates a result quite contrary to the aim reflected in the legislative

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period barring economic strike); *Labor Board* v. *Fruit Packers*, 377 U.S. 58 (1964) (right to consumer product picketing); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) (union's right to enforce fines imposed on members for strikebreaking). Here, where there is no contrary statutory language whatever, the clear intent of Congress must obviously govern.

history of the Public Law and the Opinion of the Neutral Members of Board 282.[10] In approving the carriers' post-Award removal of senior firemen from the desirable jobs they held at the Award's expiration, so as to force them into lower paying assignments, the Court below flies in the face of President Kennedy's emphasis in recommending the Public Law that every senior employee would retain "*the right to his present employment or to comparable railroad employment at comparable pay.*" Equally nullified is the assurance by the Neutral Members that as concerns the protected senior employee continued as an active employee until he "quits, retires, dies, or is discharged" for good cause, "*in no way will his employment rights be affected adversely* . . ." Significantly, the opinion below makes no effort to square the result it approves with the central enactive purpose of lifetime work and wage protections for senior firemen.

Finally, the effect of the present ruling must be viewed in conjunction with the 1967 ruling of the same Court which made permanent the job reductions of the Award although Congress and Board 282 had limited the life of the Award to two years. The net result of the Court's dual rulings is *a complete inversion of this historic Congressiondl experiment with compulsory labor dispute arbitration.* Congress made quite clear in limiting the life of the Award and in the entire legislative history that 1) job reductions which the Arbitration Board might authorize were to be strictly

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[10] Even where, unlike the present case, a statute does not touch issues of major public importance, strong grounds of comity support the grant of review where a lower court's construction frustrates a primary enacting purpose of the Congress. Illustrative is *United States* v. *Brown,* 333 U.S. 18 (1948) where the Court of Appeals' interpretation of the Federal Escape Act, permitting a prisoner to serve a sentence imposed for an escape concurrent with another sentence, frustrated the Congressional purpose to deter escape attempts. This Court reversed the lower Court's "blind nullification of the Congressional intent clearly reflected in the Federal Escape Act" (*Id.* at 27).

limited to a two-year term, and 2) in any event the senior firemen were to be protected against job and pay diminution. It was job eliminations which Congress sought to make *temporary* and protection of senior firemen which it sought to make *permanent*. But by its 1967 and 1969 rulings the Court below has made job eliminations final and protection of senior firemen illusory. Having intruded judicial authority to fill out an incomplete legislative scheme, the Court below then distorted beyond recognition the first Congressional experiment with compulsory labor arbitration.

Conclusion

Unlike the 1967 ruling of the Court below which centered on the question of the future size of the fireman craft rather than the working rights of actual employees, the question here concerns the job and pay rights of presently employed senior firemen during the remainder of their working lives.[11] In its earlier ruling the Court below declined to return to the pre-Award full manning requirements, which would have resulted in substantial hiring of new firemen, but it granted no license to carriers to disparage the job rights of incumbent firemen remaining in service after the Award's expiration. By its present decision, however, the Court below leaves these senior employees without recourse against carrier post-Award resort to the Award's job reduction pro-

[11] It should be noted that this Court has long recognized Congressional solicitude for vested employment rights and relationships. A long line of cases attests to the Court's reluctance to ascribe to the Congress an intent to permit defeat of established working rights. See, e.g., *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612 (1967); *Houston Contractors Assn.* v. *NLRB*, 386 U.S. 664 (1967); *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177 (1941); *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270 (1956); *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967); *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203 (1964); *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); *Labor Board* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962); *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960); *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960).

cedures simply to reduce costs by forcing firemen into lower paying positions. That result totally vitiates the lifetime guarantees for "protected" firemen clearly intended by the Congress and the Arbitration Board.

This Court should not countenance the frustration of the vital Congressional intention in its enactment of the 1963 Public Law which results from the ruling below. What is at stake is the right of senior firemen to work and pay privileges earned through decades of employment, which the carriers are impugning by forcing them into the least favorable junior assignments. Only this Court can now restore to the "protected" firemen the right to complete their working lives in the dignity of positions earned by a lifetime of labor.

It is submitted that the petition should be granted.

Respectfully submitted,

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APPENDIX A:

OPINIONS AND JUDGMENT BELOW

In the United States District Court for the District of Columbia

Proceedings on September 7, 1966 in Civil Action Nos. 777-66 and 784-66

Oral Opinion

The Court: In the case of Bangor & Aroostook Railroad Company against the Brotherhood of Locomotive Firemen & Enginemen, the Brotherhood is moving for a preliminary injunction which, with the consent of counsel for the moving parties, is being construed as an application for additional relief at the foot of the decree.

In the case of Brotherhood of Locomotive Firemen & Enginemen against the New York Central Railroad Company, the plaintiff is moving for a preliminary injunction.

The questions involved in the two applications are similar and overlap and the two matters have, therefore been argued together.

The questions involved relate to the status of firemen who are given a certain permanency of tenure by the Arbitration Award 282.

It is not necessary to review all of the preliminaries. Suffice it, however, to recall the fact that Award 282 of the Arbitration Board created by an Act of Congress enacted in August, 1963, provided that in freight and yard services all firemen, with the exception of ten percent, could be dispensed with as unnecessary.

In ten percent of the positions, which were to be determined pursuant to a manner provided in detail in the Award, and which is not necessary to summarize in the course of this proceeding, the positions of firemen were to be retained.

Admittedly, there is no dispute that in passenger service firemen have to be retained. The reason for the distinction

between freight and passenger service is that while all parties admit that a moving locomotive must ordinarily have two men in its cab, the practice in freight service is for the head brakeman to be stationed in the locomotive and, therefore, the fireman is unnecessary.

While ruling that ninety percent of the firemen in freight and yard service could be dispensed with, the Board nevertheless ruled that they may not be discharged forthwith. It provided for a process of attrition. All firemen known as C(6) firemen who had between two and ten years of service were to retain permanent tenure, subject to the right of the carrier to offer a comparable job to any member of this group.

All firemen having more than ten years' seniority, known as C(7) firemen, were to have permanent tenure and could not be dispensed with until they either die, retire or resign.

The question presented in the argument of these applications is what constitutes the permanency of tenure which is to be accorded to the C(6) and C(7) firemen.

The nature of the tenure, accorded to them, is defined in the Award.

Paragraph D(2) of the Award provides in part as follows:

> "Firemen helpers who remain on the active working lists of the carrier under the provisions of paragraph C(6) and C(7) of this Award shall have the right to work their turn as firemen helpers to the extent that the position of firemen helpers are available in their respective seniority districts."

And again, this paragraph provides:

> "That such firemen helpers shall have no right to jobs that the carrier may discontinue pursuant to the provisions of this Award if other employment in any class of engine service for which they are qualified is available to them in their respective seniority districts."

Obviously, the permanent tenure accorded to each fireman is not the right to remain on the same assignment or

the same run for the rest of his active life. In fact, such an interpretation would not necessarily be to the interests of the firemen because trains are at times discontinued and the permanency of tenure is not tied to any one particular train or run.

The question arises, is the extent to which the protected firemen may be assigned to positions or tasks other than those which they were performing at the time of the expiration of the effective period of the Award. As has been stated, there are certain positions that the railroads must fill. They must carry firemen on all passenger trains. They are required by the Award to maintain firemen on ten percent of the positions in the freight and yard service, and in addition, in certain states by laws known as full crew laws, require that certain personnel be hired even though such personnel could be dispensed with under the Award in the absence of such laws.

The Supreme Court has held that the full crew laws supercede the Award pro tanto.

If a vacancy arises in one of the positions that the carrier must keep filled, the question is whether one of the protected firemen may be transferred by the carrier to such a position.

The Court answers this question in the affirmative. We must construe the Award just as a statute or contract in accordance with the obvious intention of its framers. One of the purposes of the Award was to permit the railroads to dispense with firemen, but to do so gradually as a matter of protection to existing incumbents.

It would defeat the purposes of the Award if the carriers were required to go out and hire additional firemen to fill positions that must be kept filled when protected firemen are available and could be used for that purpose.

Consequently, the Court is of the opinion that carriers may transfer C(6) or C(7) firemen to any position that has to be kept filled when that position becomes vacant by reason of death, resignation or retirement of its incumbent.

Naturally, such a transfer may be made only within the seniority district to which the transferred fireman is accredited. Also, it is hardly needless to say that the carrier

must observe seniority. It may not pick any fireman at random to transfer him. It must accord an opportunity for transfer to protected firemen in the order of their seniority and, if none of them desires to accept the transfer, then the carrier's right to make the transfer is restricted to the most junior fireman on the list.

The next problem is more complicated. To what extent may a carrier transfer a protected fireman from the position to which he has been assigned to another position which need not be kept filled?

Specifically, as a suppositious case, suppose there are 50 firemen positions in a particular seniority district of which 15 are the type that must be filled. Suppose some of the remaining 35 gradually become abolished by the process of attrition due to death, resignation or retirement. May the carrier transfer a protected fireman to another position within that group?

A cognate question is, may a carrier abolish some of the positions within that group and then transfer their incumbents to other positions within that group? This question is necessarily covered by paragraph D(2) of the Award, to which reference has already been made.

The question is not a simple one. Paragraph D(2) provides that firemen who remain on the active working lists shall have the right to work their turn as firemen to the extent that positions as firemen are available in their respective seniority districts.

The question arises whether the carrier, under this provision, may make certain positions unavailable by abolishing them. Some light is cast upon this question by further provision in the same paragraph that firemen shall have no right to jobs that the carrier may discontinue, pursuant to the provisions of this Award, if other employment in any class of engine service for which they are qualified is available. That qualification seems to refer, however, to positions that the carrier discontinues or abolishes as a result of a vacancy arising due to death, resignation or retirement.

The question would not be free from doubt and there would be ambiguity in these provisions of the Award were it not for the fact that the Board has construed this Award

and has passed upon the questions that are presented to this Court for decision.

Naturally, the Arbitration Board, under the Railway Labor Act, had the power to construe its own Award.

Question 43, submitted to the Board by the Brotherhood of Locomotive Firemen and Enginemen, and the answers thereto, read as follows:

> "(a) Does a fireman-helper covered by C-6 or C-7 of the Award have the right to remain on or bid in any job as contemplated by the schedule rules that were effective before date of the Award or can the carrier exercise the individual seniority of the employee under the Award?
>
> "(b) May the carrier arbitrarily abolish blankable firemen-helper positions, thereby depriving C-6 and C-7 employees from work to which they would otherwise be entitled in accordance with existing schedule rules?"

Answer:

> "Under the terms of Section II, Part D(2), the carrier has the right to determine which of the blankable firemen (helper) positions in a seniority district shall be made available to those firemen (helpers) who are covered by Parts C-6 and C-7 and are entitled to work as firemen (helpers). In the event of a decrease in the number of firemen (helpers) positions in freight or yard service due to a decrease in service requirements, C-6 or C-7 firemen (helpers) who are thus displaced may, if there is no other work available for them, exercise seniority to blankable positions which are designated by the carrier."

Question 1(f), submitted by the Southern Pacific to the Board, and Question 3, submitted by the Brotherhood to the Board, and the answers thereto, are as follows:

> "It is the carrier's understanding that a blankable fireman (helper) position which has been blanked by a carrier need not be bulletined or otherwise made available to C-6 or C-7 firemen (helpers) for the ex-

ercise of their seniority (unless or until such position is re-established by the carrier), and that any agreement, rule, regulation, interpretation or practice prior to the effective date of the Award which is to the contrary has been modified by the Award. Is the carrier's understanding correct?" "It is the position of the Brotherhood that blanking a fireman (helper) job can occur under the Award if, and only if, there is no fireman (helper) on the fireman (helper) seniority list available to fill a vacancy which develops, that is, that the blanking of a job should be dependent upon the prior exhaustion of individual seniority rights.

"Are the Brotherhood's assertion and position correct?"

Answer:

"The Brotherhood's contention that blanking a fireman (helper) job can occur under the Award if, and only if, there is no fireman (helper) on the fireman (helper) seniority lists available to fill a vacancy which develops is not correct. A blankable fireman (helper) position which has been blanked by a carrier need not be bulletined or otherwise made available to C-6 or C-7 firemen (helpers) for the exercise of their seniority (unless such position is re-established by the carrier). The rights of C-6 and C-7 firemen with respect to the reestablishment of such positions are governed by Section II, Part D of the Award."

Southern Pacific Question 1(b) to the Board is as follows:

"It is the carrier's understanding that blankable fireman (helper) positions are those in which a carrier, under the terms of Section II, Part B(5) of the Award, is not required to use firemen (helpers) 'except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of the Award.' Is the carrier's understanding correct?"

Answer:

"The carrier's understanding is correct." Southern Pacific Question 1(c): "It is the carrier's understanding that a carrier has the right to blank, (i.e., to discontinue or abolish) and any blankable fireman (helper) position which it determines should not 'be made available to those firemen (helpers) who are covered by Parts C-6 and C-7 and are entitled to work as firemen (helpers),' unless or until the establishment or reestablishment of such a position is necessary to provide employment of the kind required by the Award to a C-6 or C-7 fireman (helper) who remains on the active working lists of the carrier. Is the carrier's understanding correct?".

Answer:

"The carrier's understanding is correct."

—

In this connection it must be observed that while the Award was in effect it created certain permanent tenure with qualifications which firemen are entitled to maintain and preserve. The limitations on that permanent tenure are contained in the Award.

The Arbitration Board, under the Railway Labor Act, was clothed with the power to interpret the terms of its own Award. In other words, it had the power to interpret the nature of the tenure which it was according to the protected firemen.

That does not detract from the fact that the Award has come to an end and is no longer effective, but the vested rights that it created while it was effective are not thereby destroyed. It would be a very sad thing for the firemen if they were destroyed, because then the railroads would be in a position to discharge all the so-called protected firemen overnight. This they may not do under the Award.

Now it is clear under the interpretation of the Board that the carriers have to maintain enough positions to accord an opportunity for employment to all the protected firemen within their seniority districts. In other words, they are under no obligation to maintain any specific posi-

tion, and that being so, they have a right to transfer a protected fireman from one position to another within the seniority district to achieve a right to abolish certain positions, as they choose, provided they retain enough to furnish employment to all the protected firemen on their active list.

The Court realizes that some hardship and some detriment will result to some of the protected firemen under certain circumstances. There is some degree of protection, of course, in the fact and in the requirement that in making transfers the order of seniority must be followed by the carrier. They may not select a particular fireman at random and transfer him irrespective of his seniority. They must have regard to seniority in the manner to which the Court has already referred in connection with transfers to positions that have to be filled.

A word should be said about transfers to hostler jobs. It is clear that hostlers are within the group of firemen and, therefore, hostler positions are positions to which transfers may be made. It is claimed, however, that occasions may arise, especially with men who have reached middle life, when an employee may be physically unable to do the work of a hostler although perfectly capable of doing the work of a fireman.

The Court is of the opinion that if such a situation arises, the fireman should not be compelled to take a hostler assignment because that would indirectly defeat the protected tenure which is accorded him by the Award. If a dispute arises as to whether a particular fireman is capable of carrying on the task of a hostler, that should be determined by an impartial medical examination os possibly by a Local Board.

The Court, as it has ruled heretofore, is not going to determine individual grievances of individual employees or disputes concerning specific cases. The principle of forum non conveniens would preclude doing that. The Court will not draw here to Washington the task of disposing of possible individual controversies in all other parts of the country.

The Court is of the opinion that these would constitute minor grievances within the jurisdiction of the National

Railroad Adjustment Board. Title 45, Section 153, which in part governs the jurisdiction of the Board, provides in sub-section (h) that the first division of the Board shall have jurisdiction over disputes involving train and yard service employees of carriers, that is, engineers, firemen, hostlers and outside hostler helpers, conductors and yard service employees.

Sub-section (i) vests in the Board jurisdiction over disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.

In addition to that, by the Act of Congress approved June 20, 1966, Public Law 89-456, machinery is created for the appointment of Special Boards of Adjustment to resolve disputes otherwise referrable to the Adjustment Board. Such local boards will, it is hoped, eliminate the delays that have occurred before the National Railroad Adjustment Board due to the volume of business with which that Board has been confronted.

The Court sees no reason for granting any injunctive relief. It will, as it has done on prior occasions, render its decision in the form of a declaratory judgment setting forth the principles heretofore outlined in this oral opinion.

These principles will govern the disposition of any controversy that may arise. If there is any dispute as to the application of any one of these principles to any particular situation as it has been stated, that can be referred either locally to the National Railroad Adjustment Board or to a Special Board of Adjustment created under the new statute.

Counsel may submit a proposed judgment in accordance with the decision.

This oral opinion will constitute the findings of fact and conclusions of law.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CICRUIT

No. 20,472

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., *Appellees*

No. 20,473

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Appellees*

No. 20,647

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellee*

Appeals from the United States District Court for the District of Columbia

Decided February 28, 1969

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Isaac N. Groner, Alex Elson* and *Mrs. Harriett R. Taylor*, were on the brief, for appellant.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief, for appellees.

Before: DANAHER,* BURGER and LEVENTHAL, *Circuit Judges.*

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* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

PER CURIAM: This case involves another aspect of the railroad work rules litigation. It concerns a supplemental issue that arose in the District Court in ancillary proceedings after issuance of the judgment that was reviewed by this court in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R.R. Co.*, 128 U.S. App. D.C. 59, 385 F. 2d 581 (1967), *cert. denied*, 390 U.S. 923 (1968).

The rulings now before us were made by the District Court in rejecting overtime applications by the Brotherhood of Locomotive Firemen & Enginemen (BLFE) for injunctive relief. The underlying fact situation is the case where a carrier has, during the life of Award 282, listed runs and crews for purpose of abolition of firemen jobs, and such listing has not been vetoed by the Union under the Award, yet the carrier has in fact continued in service on such runs firemen helpers who come within paragraphs C(6) and C(7) of the Award.[1]

The District Court held that in general the carrier has the authority to take action subsequent to expiration of the award to remove the firemen from the listed run. The District Court studied and relied on the Award and on interpretative rulings of Arbitration Board 282.[2] We think this ruling is correct under the *Akron* decision.[3] We do not

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[1] Sections C(6) and C(7) are concerned with the impact of job reduction on firemen employees of the railroad. Section C(6) applies to those helpers with less than 10 years' seniority, and provides that they shall be assured of "comparable" employment with the carrier, as, for example, clerk, brakeman, fireman, etc. Section C(7), dealing with firemen with more than 10 years' seniority, confers greater protection, by assuring them that they will have the opportunity to work engine jobs, "unless and until retired, discharged for cause, or otherwise removed . . . by natural attrition." These sections protect the right to employment and guarantee a certain kind of employment, but do not protect specific jobs.

[2] Answers to Questions 3 and 43 (of BLFE); Questions (b), (c) and (f) of Southern Pacific.

[3] *See* 128 U.S. App. D.C. at 89, 385 F. 2d at 611:

> Conversely, however, if the work rule in effect on the last day of the Award provided that a fireman was not required for a particular engine crew—because that crew was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though.

say there are no limits on the authority of the carrier.[4] But the mere fact that a carrier terminates the use of a C(6) or C(7) fireman is consistent with the work rule under the Award and Act where the work rule defines the position as one that requires no firemen, and hence is blankable.

Counsel for BLFE say that the Award intends protection for C(6) and C(7) firemen. But it would be inconsistent with the structure of the award to say that they have a right to stay on the blankable job and the carrier has to hire a new man to put in a vacancy in a must-fill position. Even where the vacancy being filled is in another blankable position, there are Board precedents for the carrier.

The only clear protection given by the Award to a C(6) and C(7) fireman is the right to be employed—even if the railway has to keep a fireman in a blankable position. He also has seniority rights, and the right to limit the transfers resulting from a blanking action to the same seniority district. While there may be limits on a carrier's authority emanating from an implied good faith standard, the case before us arises on a broadside claim of lack of carrier authority and that claim is not sustained.

Affirmed.

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for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award. The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew.

[4] Some kind of good faith limitation is indicated by the Board's Answer to BLFE. Question 75—a limitation there on the carrier's authority to change designation of blanked assignments. We are not required to consider whether there may be other good faith limitations. The District Court noted that a fireman could not be required to serve as a hostler in work beyond his physical powers.

Filed Feb. 28, 1969 Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968.

Civil Action 777-66

No. 20,472

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., *Appellees*

Civil Action 784-66

No. 20,473

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Appellees*

Civil Action 1686-66

No. 20,647

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellee*

Appeals from the United States District Court for the District of Columbia

Before: DANAHER,* BURGER, and LEVENTHAL, Circuit Judges.

JUDGMENT

These cases came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgments of the District Court appealed from herein are hereby affirmed.

Per Curiam

For the Court:

Nathan J. Paulson,
Clerk.

Dated: February 28, 1969.

Opinion per curiam.

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* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

APPENDIX B: PUBLIC LAW 88-108

ACT OF AUGUST 28, 1963, 77 STAT. 132, U.S.C. TITLE 45, FOLLOWING § 157

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have

been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish

to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the

board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 180

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner*,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., and the NEW YORK CENTRAL RAILROAD COMPANY, *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

In an earlier decision the court below held that work rules established pursuant to Arbitration Award No. 282 continued to apply, after the expiration of that Award, until changed in accordance with the Railway Labor Act. This Court denied a petition by the present petitioner for a writ of certiorari to review that decision. In the present case petitioner sought to raise that issue for a second time and the court below adhered to its prior decision. Petitioner is again asking this Court to review the question of whether work rules established pursuant to Award 282 continue to apply, after expiration of the Award, until changed in accordance with the Railway Labor Act.

Statement of the Case

For at least 70 years if not longer, firemen generally have not been hired to work on a particular crew, or on a particular locomotive, or at a particular location. Their assignment at any particular time is dependent upon the workings of a seniority system, pursuant to collective bargaining agreements, whereby the jobs made available to firemen within a seniority district are subject to the exercise of seniority with the most senior man having preference in the event that two or more firemen seek the same assignment. Hence, transfers from one assignment to another, both of a forced and a voluntary nature, have long been characteristic of a fireman's employment, and such transfers have often been necessary even though the new assignment may be regarded by the particular fireman as less advantageous than his existing assignment in terms of earnings, location, days or hours of work, or other factors. The work rules established by the Award of Arbitration Board No. 282 did not alter this seniority system, but did authorize respondents to reduce the number of fireman assignments made available for the exercise of seniority. The "hardships" of which petitioner complains, to the extent that they exist at all, are a normal consequence of the exercise of seniority among assignments made available by respondents and of the reduction in the number of assignments pursuant to the work rules as modified by Award 282.[1] JA 98-99, 104,

[1] Many of the allegations in petitioner's affidavits were inaccurate or incomplete. See JA 30-139, 145-153, 157-213, 254-260, 262-276. For example, with respect to the matter referred to in the Van Dover letter quoted in the petition (p. 9, fn. 4) as "illustrative," the carrier's affidavit (JA 105-108) reveals that the transfer of certain firemen from Poplar Bluff to St. Louis was made in response to a complaint by petitioner that more firemen were needed in St. Louis as the existing employees were being required to work overtime excessively, and because the firemen in question were restricted (because of their qualifications) to hostler assignments when available, which assignments were available at St. Louis but not at Poplar Bluff.

110-111, 118-119, 123, 124-125, 131, 135-136, 170-180, 256-257, 271-274.

Although the replacement of steam-powered locomotives by diesels deprived firemen of their primary function and rendered them unnecessary to the safe and efficient operation of most locomotives, collective bargaining agreements continued to require the use of a fireman on most locomotives. To remedy this wasteful and expensive use of manpower, the railroads in 1959 served proposals pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156) to change those agreements so as to give management discretion insofar as the use of firemen on non-steam-powered freight and yard locomotives was concerned. When the procedures of the Railway Labor Act were exhausted without settling the dispute and a nationwide railroad strike impended, the Congress enacted P.L. 88-108 (77 Stat. 132) whereby the fireman manning issue (and another issue as to the manning of train crews) was submitted to compulsory arbitration.

The Award by Arbitration Board No. 282 (JA 11-18) continued the existing rules concerning the use of firemen in effect except as modified by the Award. In general, the Award modified those rules so as to permit the carriers to abolish up to 90% of all fireman assignments in freight and yard service, subject however to an obligation to continue to make enough assignments available so as to provide an opportunity for employment in engine service to certain firemen (generally those with ten years or more seniority as of the effective date of the Award) who were to be retained in engine service until removed by natural attrition. The carriers determine which of the assignments within the 90% should be abolished and which should be made available so as to provide employment in engine service to the firemen entitled thereto by the Award to the extent that enough assignments in which firemen have to be used are

not available for that purpose. The seniority rules generally were not modified by the Award, and the seniority system continues to operate as before with the exception that fewer assignments are made available to the reduced number of firemen for seniority choice. See JA 19-29, 176-177. The validity of Award 282 was attacked by petitioner and other unions, but was upheld in *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 118 U.S. App. D.C. 100, 331 F.2d 1020 (1964), *cert. denied*, 377 U.S. 918 (1964).

Award 282 expired on March 31, 1966, and an issue arose as to what work rules should govern the use of firemen after that date. The Court of Appeals "approve[d] the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition [as contended by petitioner] and that the new plateau of work rules, established for early 1966 by the Award, continued in effect unless changed in accordance with the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, 128 U.S. App. D.C. 59, 385 F.2d 581, 587 (1967), *cert. den.*, 390 U.S. 923 (1968). See, generally, 385 F.2d, at 592-594, 608-612.

While the appeal in that case was pending before the Court of Appeals, petitioner brought this ancillary proceeding requesting the District Court to interpret its judgment (see JA 214) and to enjoin the carriers from engaging in various activities allegedly prohibited by that judgment (JA 139-141).[2] Affidavits filed by the parties conflicted as to many details, but petitioner accepted the following statement of facts made by respondents in a brief filed with the District Court (JA 214-215):

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[2] In addition, petitioner filed an independent action against respondent New York Central R. Co. in the United States District Court for the Southern District of Indiana, which was transferred by that Court to the District of Columbia where it was heard and disposed of together with the ancillary proceeding (see JA 232-254, 261, 276-278).

"Thus, while the affidavits allege a bewildering variety of specific facts, many of which are in dispute, the activities complained of for the most part come within the following categories: (1) actions by a carrier in the exercise of its right under its rules as modified by the Award to determine which of the 'blankable' assignments should be made available to C(6) and C(7) firemen in the exercise of their seniority so as to provide them with engine service employment, and which should be discontinued or 'blanked,' as where an assignment was blanked after the incumbent fireman was promoted to engineer or voluntarily transferred to another assignment; and (2) actions by a carrier in the exercise of its right under its rules as modified by the Award to use its firemen in 'must fill' assignments or on extra boards, which protect temporary vacancies in 'must fill' assignments, as where blankable assignments are discontinued or 'blanked' so that some firemen will have to claim such 'must fill' or extra board assignments in the exercise of their seniority in order to obtain engine service employment."[3]

Hence, petitioner conceded that respondents' activities of which it complained were taken "in the exercise of [their] right under [their] rules as modified by the Award" and, as the lower courts pointed out (Pet., App. A, at 30-36, 39),

[3] A "blankable" assignment is one within the 90% that the carriers were authorized by the Award to abolish if not needed to provide engine-service employment to employees entitled thereto by the Award. Such an assignment is said to have been "blanked" when it is in fact abolished because no longer needed for that purpose. A "must fill" assignment is one in which a fireman must be used, such as those within the 10% not subject to being abolished under the Award, passenger and hostler assignments. "C(6) and C(7) firemen" are those entitled by the Award to engine-service employment until removed by natural attrition (or in the case of C(6) firemen, until offered a comparable job). Firemen on an "extra board" fill temporary vacancies in regular assignments, as where the fireman holding the regular assignment is ill or on vacation.

Board 282 has interpreted its Award as authorizing such actions. See, also, JA 19-29. The only issue before the District Court, therefore, was whether respondents could thus continue to apply their rules as modified by the Award after expiration of the Award under that Court's judgment of May 12, 1966. See JA 143. Since that judgment provided (JA 6), among other things, that "the railroads need not use firemen (helpers) on engines (other than steam powered) in freight and yard service except as required by the Award" as "the modifications in [the prior rules] made by . . . the Award and actions taken thereunder created a new status which is to be maintained after the expiration of the Award until changed" in accordance with the Railway Labor Act, the answer obviously was that respondents could do so, as the District Court held in its order of September 20, 1966 (JA 229-230).

In addition to contending before the District Court that its May 12, 1966 judgment should be construed to prohibit the activities complained of in this proceeding, petitioner contended before the Court of Appeals on appeal from that judgment that it should be reversed because, among other things, it permitted such activities. Thus, petitioner referred to the situation involving the New York Central (JA 232-278) as an illustration of its contention that the judgment of the District Court was "unreasonable,"[4] and set forth in full the Shattuck affidavit quoted in the present petition (pp. 9-10) to support a contention that the Court of Appeals, if it rejected petitioner's basic contention that the old rules automatically were restored to full force and effect when Award 282 expired, should hold that firemen must be used "except as to jobs from which firemen actually had been removed during the period of the Award."[5]

[4] Brief, at 35-37.

[5] Reply Brief, at 17-23. In its initial opinion, the Court of Appeals directed the parties "to submit within 10 days a proposed judgment,"

The Court of Appeals in its earlier decision rejected that contention pursuant to its fundamental ruling that the work rules established under Award 282 continued to apply until changed in accordance with the Railway Labor Act. Among other things, that court ruled:

> ". . . [I]f the work rule in effect on the last day of the Award provided that a fireman was not required for a particular engine crew—because the crew was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award. The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew."

Brotherhood of Railroad Trainmen v. *Akron & B.B. R. Co.*, *supra*, 385 F.2d, at 611.

In its petition for writ of certiorari requesting this Court to review that earlier decision (No. 859, O.T. 1967), petitioner asserted (p. 22), among other things, that: "Accentuating the importance of that question [presented in

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at which time they could "also request supplemental rulings on any matters that have not been discussed in this opinion." 385 F. 2d, at 605. In responding to that direction, petitioner urged the Court of Appeals to adopt the position thus asserted in petitioner's Reply Brief. Memorandum Concerning Judgment Proposed by the Brotherhood of Locomotive Firemen and Enginemen, at 3. The Court of Appeals rejected that contention, in the paragraph of its supplemental opinion quoted in the text immediately following this footnote.

that petition] is the consideration that this Court's resolution of the central issue herein will be dispositive or controlling in a large volume of pending federal litigation, involving ancillary issues concerning the continuing effect, if any, of the expired Award" (citing in a footnote the instant case [Nos. 20,472, 20,473 and 20,647 in the court below] among others). Petitioner further complained at that time (*id.*, at 16-17) that the District Court in the September 20, 1966 order appealed in this case had "permitted additional reductions" in the number of fireman assignments after expiration of Award 282,[6] and that the Court of Appeals in its prior supplemental opinion similarly "rule[d] that jobs manned during the Award may be left vacant when a fireman leaves that position due to health, retirement, etc., after the expiration of the Award." This Court denied that petition for writ of certiorari as well as petitions directed to other rulings by the Court of Appeals filed by respondents here and by other unions. 390 U.S. 923.

Nevertheless, petitioner continued to press its appeal in this case from the September 20, 1966 order by the District Court, attempting in effect to reargue the very issue that the Court of Appeals had thus decided and as to which this Court had denied certiorari. Petitioner sought to justify that action and distinguish the ruling by the Court of Appeals quoted above, because (Brief, at 28, fn. 10): "We cannot believe that in 1967 this Court could have resolved the present issue before it had properly been briefed or

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[6] "Among those rulings were approval of forced transfer of firemen from more desirable jobs (by vacating jobs manned during the Award) to less desirable jobs at distant places resulting in dollar savings to the railroads; . . . . Judge Holtzoff's adverse rulings in these several respects, entered months after his issuance of the judgment in the underlying actions, were duly appealed by the BLF&E to the court below in . . . Nos. 20,472, 20,473 . . . and . . . No. 20,647. By stipulation of the parties those appeals have been held in abeyance pending the resolution of the underlying issue in this case." Pet. in No. 859, O.T. 1967, at 16, fn. 10.

argued and the BLF&E granted its full day in court upon so vital a question." But, as we have shown, the question had been specifically briefed and argued before the Court of Appeals in the prior case, as well as being implicit in the fundamental issue in that case as to what rules applied following the expiration of Award 282. Thus, that Court held that the September 20, 1966 ruling by the District Court "is correct under the *Akron* decision" (Pet., App. A, at 39), quoting in a footnote to that statement the passage from its prior decision which we have quoted above.

Argument

We think it obvious from our Statement of the Case that the decision below is not one that should be reviewed by this Court on petition for writ of certiorari. As we have there demonstrated, this Court already has denied a petition for writ of certiorari requesting review of an earlier decision of the same issue in an even broader context by the court below. The present decision by the court below merely reiterates and applies one aspect of its earlier decision. Nothing has occurred since the earlier petition was denied to cause this Court to change its mind and grant this petition. Petitioner does not even contend that the decision below conflicts with a decision of some other court, and there is no such conflict. Rather, the decision below accords with the earlier decision of that court (and also of the District Court). And, the issue of law decided has no more general importance now than when it was first decided. Indeed, the earlier decision by the Court of Appeals involved a number of other rulings which respondents here or other unions sought to have reviewed and which added to the overall importance of that decision as compared to the decision now sought to be reviewed. In essence, throughout this proceeding petitioner has tried to obtain a "second bite at the

apple'' by persuading the courts to depart from a prior decision in the guise of interpreting that decision to mean the contrary of what was explicitly said. Both the District Court and the Court of Appeals refused to go along with that gambit, and we submit that they were fully justified in so doing.

Award 282 modified the prior work rules so as to authorize respondents to eliminate the use of firemen on about 90% of the crews in freight and yard service, subject to a requirement that engine-service employment be made available to certain existing firemen until removed by natural attrition. All that respondents have done is to assure that the firemen thus retained are used in assignments which must be filled (as in the 10% ''vetoed'' by the union under the Award), and where there are not enough such assignments to provide engine service to all of the firemen entitled thereto under the Award, to determine which of the assignments within the 90% subject to being abolished are to be made available for that purpose. If this were not allowed, respondents would have to hire a new employee every time a ''must fill'' assignment is vacated to fill that assignment, even though existing firemen were being used in assignments where firemen are not needed.

There is no contention that any fireman entitled thereto under the Award has been deprived of employment in engine service. Petitioner conceded in the District Court that the activities complained of were permitted by respondents' ''rules as modified by the Award,'' and thus were lawful if those modified rules continued to apply after expiration of Award 282. The Court of Appeals undoubtedly held in its prior decision that respondents' work rules as modified by the Award do continue to apply after expiration of the Award until changed in accordance with the Railway Labor Act,[7] and specifically

[7] Petitioner seeks to distinguish (Pet., at 18-19) between the Award

applied that principle to uphold activities of the kind now complained of. Petitioner does not contend that the Court of Appeals misinterpreted its prior opinion, and plainly could not reasonably so contend. The decision below merely upholds for the second time the right of respondents to continue to apply their work rules as modified by Award 282, and does not authorize any action which would violate those work rules unless and until changed in accordance with the Railway Labor Act.

We see no need to discuss in detail at this time the reasons why the court below was correct in holding that respondents' work rules as modified by Award 282 continue to apply until changed in accordance with the Railway Labor Act. We note, however, that the Congress in P.L. 88-108 integrated the arbitration there provided into the "time tested provisions of the Railway Labor Act." S. Rept. No. 459, 88th Cong., 1st Sess., at 3. Section 4 of P.L. 88-108 provided that, to the extent possible, "the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, [and] the board's award shall be made and filed as

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itself and interpretations by Board 282 of its Award. But Section 4 of P.L. 88-108 directed Board 282 to conduct its arbitration pursuant to Sections 7 and 8 of the Railway Labor Act which provide, among other things, that disputes over the meaning or application of an arbitration award shall be submitted to the board that rendered the award, and that the rulings of the board thereon shall be filed with "the original award and become a part thereof," 45 U.S.C., § 157 Third (e), and "shall have the same force and effect as such original award," 45 U.S.C. § 158(m). See *e.g., Brotherhood of Rail. Train.* v. *Terminal R. Ass'n of St. Louis*, 127 U.S. App. D.C. 37, 380 F. 2d 584 (1967), *cert. den.*, 389 U.S. 940 (1967); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.*, 121 U.S. App. D.C. 230, 349 F. 2d 207 (1965); *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 120 U.S. App. D.C. 295, 345 F. 2d 985 (1965). Thus, the "Award" which modified the prior work rules included not only Award 282 as originally issued but also the interpretive rulings by Board 282 which by statute became a part of the Board's award. We think it obvious from their face that the statements quoted in footnotes 6 and 7 to the petition (p. 19) are not to the contrary and do not hold "that the Board's rulings were explicitly restricted to the life of the Award."

provided in said sections and shall be subject to section 9 of said Act." Under the Railway Labor Act, existing "rates of pay, rules, or working conditions" may be changed only by agreement or by giving 30-days' notice of proposed changes (45 U.S.C. § 156) and exhausting the procedures specified by the Act with respect thereto. *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 377-379 (1969). Consequently, the rules established by an agreement or arbitration award continue to apply after the termination of that agreement or award until changed in the manner provided by the Act. *Manning* v. *American Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir., 1964), *cert. den.*, 379 U.S. 817 (1964). The prior decision by the court below simply applied this established principle to the rules established by Award 282. See 385 F.2d, at 593.

Petitioner's principal contention appears to be that some firemen have been forced to transfer to assignments that are less desirable in terms of earnings, location, etc. than their prior assignments, and that such "hardships" were not intended by the Congress in enacting P.L. 88-108. That argument fundamentally attacks the validity of Award 282 itself, since the activities complained of were authorized by respondents' rules as modified by that Award. Award 282 was made subject to Section 9 of the Railway Labor Act (P.L. 88-108, § 4), which requires that attacks upon the validity of an arbitration award be made within 10 days after the award is filed (45 U.S.C. § 159 Second). Moreover, the validity of Award 282 was upheld in a prior action brought by petitioner and others (see p. 4, *supra*), which decision is *res judicata* with respect to any contentions going to the validity of the Award. *Brotherhood of Rail. Trainmen* v. *Chicago, M., St.P. & P. R. Co.*, 127 U.S. App. D.C. 58, 380 F.2d 605, 608 (1967), *cert. den.*, 389 U.S. 928 (1967); *Brotherhood of Rail. Train.* v. *Chicago, M., St.P. & P. R. Co.*

(L.E.), 127 U.S. App. D.C. 289, 383 F.2d 216 (1967), *cert. den.*, 389 U.S. 933 (1967).

In any event, the Congress did not intend that the more senior firemen be protected against all "hardships." The excerpt from the speech by President Kennedy (Pet., at 15-16, 26) merely expressed his understanding that reports of two boards which had investigated the manning dispute [8] advocated the principle that each existing employee having a significant attachment to the industry should "retain the right to his present employment or to comparable railroad employment at comparable pay," and thus would not be "thrown out in the street" and would suffer "little, if any loss." Award 282 was responsive to that view, providing that certain existing firemen who accepted offers of comparable jobs were to receive five-year guarantees of their annual earnings, and that those firemen entitled to remain in engine service were to continue to receive engine-service employment (JA 15-18). Such employment has never entitled the firemen to continue in a particular assignment or guaranteed them against being disadvantaged by transfers to other assignments (see pp. 2-3, *supra*), and President Kennedy recognized that they might incur some "loss."

We note that, as stated in H. Rept. 713, 88th Cong., 1st Sess., at 3, the "reported legislation differs considerably from the recommendations of the President," as the "committee feels that developments since the President submitted his proposal have made the approach of the reported bill preferable, since the parties are closer together now than they were at the time his recommendations were made." The "reported bill," which was enacted as P.L. 88-108, provided in Section 3 that Board 282 should give "due consideration to those matters on which the parties were in

[8] Respondents accepted the recommendations of those boards, but they were rejected by petitioner, which is the only reason why the boards did not succeed in settling the dispute.

tentative agreement." And, the Neutral Members of Board 282 pointed out (emphasis added) that: "There has never been any dispute in these proceedings over the status of firemen with ten or more years of seniority. *Our award reflects the agreement between the parties that all firemen in that category* who are not 'irregulars' or on furlough *shall retain all existing employment rights, except as modified by the provisions of the award relating to reduction of jobs,* and that, in any event, they shall not be terminated except for cause or by natural attrition." *Opinion of Neutral Members,* 41 Lab. Arb. 680, 693 (1963).

In short, as the Neutral Members carefully pointed out, while the more senior firemen retained their existing employment rights, they did so subject to the right of the carriers under the work rules established by the Award to reduce the number of jobs made available for the exercise of such employment rights. Indeed, as the Neutrals noted, that principle had been agreed to by petitioner as well as by respondents. In embodying that principle in the Award, therefore, Board 282 simply followed the statutory direction that it give "due consideration to those matters on which the parties were in tentative agreement." Nothing in P.L. 88-108, on the other hand, purported to require Board 282 to protect existing firemen against all "hardships."

As we have pointed out, the "hardships" of which petitioner complains have long been characteristic of firemen's employment and result primarily from the operation of the seniority system established by agreement with petitioner.[9]

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[9] The Report of the National Joint Board noted (pp. 43-44) that: "Characteristics of engine service assignments which affect earnings include hours on duty, number of trips or tours of duty per week, speeds of trains, constructive allowances and arbitrary payments, time paid for but not worked, and a wide variety of operating conditions," and that "earnings are further dependent upon the time [the individual firemen] elect to lay off for personal or other reasons—a right which may be freely exercised if other employees are available to protect the service." In

See pp. 2-3, *supra*. This matter is put into broader perspective by the January 5, 1966 Report of the National Joint Board established pursuant to Award 282 with directions (JA 18) to make "an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen. . . ." The Joint Board concluded, among other things, that (Report, at 34):

> "The available data dealing with the earnings and earnings opportunities of firemen and the incidence of hardship among such employees affected by the Award indicates that
>
> 1. The earnings and earnings opportunities of firemen have improved or increased since the effective date of the Award
>
> 2. Cases of actual hardship among employees affected by the Award are rare
>
> 3. Such loss of earnings or hardship as may have resulted from the application of the Award, with rare exception, occurred during the first several months that the Award was effective
>
> 4. Such loss of earnings or hardship could usually have been avoided by the employee, resulting in most cases from the employee's own choice of alternatives available to him under the provisions of the Award."

These conclusions were based in part upon a 1965 survey by petitioner of 29,916 firemen in which only 188 reported that their earnings had declined during the 12-month period immediately following the effective date of the Award as compared with the 12-month period immediately prior to the effective date of the Award (Report, at 35, 42-43).

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addition, the Report noted that "[v]ariations in the earnings levels of individual firemen are characteristic of the service and unavoidable" (p. 48) and that "[w]ork away from home is one of the characteristics of train and engine service employment" (p. 51).

There is no reason to believe that this overall picture as it existed during the period of the Award, as found by the National Joint Board, is drastically different today. Indeed, as the Joint Board found, the situation during the period of the Award improved after the initial dislocations in the first few months as conditions became more settled. The carriers have continued to apply their work rules as modified by the Award, as the courts below held could be done, and the practices complained of in the petition are no different from the practices that took place prior to expiration of Award 282.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 180

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner,*

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., and the NEW YORK CENTRAL RAILROAD COMPANY, *Respondents.*

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

The principal point repeatedly urged in the Opposition is that two years ago in *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook Railroad Co., cert. denied,* 390 U.S. 923, this Court "denied . . . review of an earlier decision of the same issue" presently before the Court. But as the carriers themselves defined the "Question Presented" in that 1967 case (Brief for Respondents Concerning Petition for Writ of Certiorari, p. 2), it was whether upon Award expiration "the modifications in prior agreements and rules governing the employment of firemen which were made by or pursuant to the Award continue to apply . . . or do the prior agreements and rules automatically revive . . ." In contrast to that issue, the present different question concerning post-Award carrier action forcing re-

maining firemen into inferior jobs was not litigated, passed upon by the lower court, or urged upon this Court for review in the earlier case.

Clearest refutation of the carriers' claim that the present issue was previously decided by the Court of Appeals' 1967 ruling comes from that Court itself. In the present case the carriers urged upon the Court of Appeals below, as they urge here, that its 1967 decision authorized them to abolish jobs after the Award expired so as to force men into lower paying assignments; far from accepting that *res judicata* contention the opinion below (see Petition, p. 39) commences by stating:

> "This case involves another aspect of the railroad work rules litigation. It concerns a supplemental issue that arose in the District Court in ancillary proceedings after issuance of the judgment that was reviewed by this Court in *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R.R. Co.*, 128 U.S. App. D.C. 59, 385 F. 2d 581 (1967) *cert. denied*, 390 U.S. 923 (1968)."

Apart from the groundless suggestion that the present issue was earlier decided, the carriers offer little in direct response to the important question now presented concerning working rights of senior firemen who remain in employment after the Award's expiration.[1] While conceding hard-

[1] The carriers suggest (Opposition, p. 5) that counsel for the Brotherhood conceded in the District Court that a carrier is exercising its "right under its rules as modified by the Award" when after Award expiration it forces a fireman to another job to reduce his wages. Of course there was no such concession intended or made. While Brotherhood counsel generally concurred in the quoted statement by carriers' counsel in so far as the two categories of cases were concerned, he clearly did *not* concede the central issue posed in this case, to which the District Court properly addressed its opinion (see Petition, pp. 11-14), as did the Court below.

ship to firemen, they cite (Opposition, p. 15) a National Joint Board report of January 5, 1966, finding little hardship resulting from the Award during its life. But what is presently in issue is the *post*-Award action of the carriers abolishing desirable assignments to force remaining firemen into lower paying jobs, with manifest resulting hardship which clearly was not within the compass of the Joint Board's 1966 report. It should be noted that the District Court excluded that report from evidence in this case on grounds of irrelevance (Tr., May 4, 1966, pp. 35-39). After the Award ever fewer firemen remain in service and far greater hardship results as senior men are forced into the few most inferior assignments in the seniority district. Thus, on a line with one hundred firemen working in "blankable" positions, hardship was minimal during the Award as long as most firemen remained in service; but now when only 10 or 20 firemen remain, forcing them into the least lucrative 10 or 20 positions among one hundred operating runs depresses senior firemen into assignments at the bottom of the desirability ladder. It is this circumstance which causes increasing hardship after Award expiration as the carriers force the remaining firemen into the poorest positions.[2]

Decisive in the present case is the carriers' failure to meet our basic objection—that job abolition procedures which

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[2] Disregarding the crucial consideration that Award 282 expired in 1966, the carriers repeatedly insist (see Opposition, pp. 12, 14) that their *post*-Award abolition of desirable assignments to force the remaining firemen into lower paying work is authorized by the Award itself. But Board 282 not only did not authorize any such post-Award action by the carriers, it could not have done so in view of the limits of its jurisdiction. As the carriers themselves have pointed out to this Court (*Bangor and Aroostook R. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen*, No. 933, October Term, 1967, Petition, p. 31, n. 13): ". . . the Neutral Members were not purporting to decide what rules were to apply after the Award expired. Board 282 has disclaimed any jurisdiction to decide that issue, which involves an interpretation of the Railway Labor Act and P.L. 88-108 rather than an interpretation of the Award. Answer, on June 9, 1964, to SUNA Question No. III."

were authorized during the Award, strictly in connection with reductions in the firemen's ranks, are being used by the carriers after Award expiration when such reductions are no longer permissible for the *ultra vires* purpose of forcing remaining firemen into the least desirable jobs. What was in issue in the earlier litigation was the post-Award status of reductions effected during the Award in the ranks of the firemen. What is in issue in this case is the post-Award working rights of "protected" firemen who were not eliminated, to whom the President, the Congress, and Board 282, clearly sought to assure work and pay rights commensurate with their seniority and lifetime of honest labor. That issue is ripe and deserving of this Court's review.

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